

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 5, 2005 Session

FREDERICK MARTIN UMANS v. DEBORAH LYNNE UMANS

**Appeal from the Circuit Court for Davidson County
No. 01D-1673 Muriel Robinson, Judge**

No. M2004-00095-COA-R3-CV - Filed August 23, 2005

Former husband appeals trial court's denial of a reduction in alimony, the effective date of the child support reduction, the award of attorney's fees and the finding of criminal contempt. The trial court is affirmed in all respects except the finding of criminal contempt which is reversed for lack of proof of willfulness.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part, Reversed in Part**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Clark Lee Shaw, Nashville, Tennessee, for the appellant, Frederic Martin Umans.

Thomas F. Bloom, Nashville, Tennessee, for the appellee, Deborah Lynn Umans.

MEMORANDUM OPINION¹

In the parties' October 2002 final divorce decree, Ms. Umans was awarded alimony *in futuro* of \$1,100 per month and child support for the couple's child of \$993.60 (representing the guideline amount of \$864, plus an upward deviation arising from the father's failure to exercise visitation). The decree specified that Mr. Umans was required to make the alimony and child support payments on the first day of each month.

¹Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

On March 5, 2003, Mr. Umans petitioned the court to reduce his child support payments alleging that he had visited or attempted to visit the couple's child. On May 20, 2003, Ms. Umans filed a counterpetition alleging Mr. Umans was in criminal contempt of court for failure to pay child support, alimony, and incremental payments on an attorney's fees award according to the requirements of the decree. Several months later on January 7, 2004, Mr. Umans amended his petition to also seek a reduction in alimony alleging a reduction in his income and raising income reduction as an alternate ground to reduce child support.

The trial court held a hearing on the petitions on January 8, 2004, wherein Mr. Umans, his employer, and Ms. Umans testified. Mr. Umans's supervisor testified that effective April 1, 2003, Mr. Umans's annual salary was reduced from \$68,000 to \$57,876. Mr. Umans testified that his pay schedule had likewise changed from the 1st and 15th of each month to the 5th and 20th of each month. It was not disputed that Mr. Umans provides housing for his girlfriend while she contributes to other household expenses. Mr. Umans has one job.

Ms. Umans testified that she has two jobs, working for Metro Schools and working at Dillards about 25 to 27 hours per week. She testified that due to reclassification of her job with Metro Schools her salary will be reduced. Prior to the anticipated reduction in pay, Ms. Umans makes approximately \$35,000 from her two jobs. According to Ms. Umans, she is barely able to meet expenses.

It was not disputed that Mr. Umans was in arrears in his alimony and routinely paid the child support late. The record does not suggest Mr. Umans owed back child support.

The trial court issued its opinion on January 30, 2004. The trial court found Mr. Umans in criminal contempt for "failure to pay child support timely" sentencing him to one weekend in jail, which was stayed pending appeal. Mr. Umans's child support obligation was reduced to \$775 per month. At the hearing while ruling from the bench, the trial court said it was reducing child support due to Mr. Umans's reduction in income.² While not specifically addressed, the trial court did not make the child support adjustment retroactive. The trial court declined to reduce the alimony amount. On this issue, the trial court found:

The Father makes twice as much money as the Mother. The Mother is working two jobs. The Mother still has a need and the Father still has the ability to pay.

Ms. Umans was awarded a judgment of \$6,747.03 for alimony arrearage and \$1,400 in attorney's fees. On January 14, 2004, Ms. Umans filed a motion asking the court not to incarcerate Mr. Umans, which the trial court denied.

²The amount of the child support reduction was not appealed.

On appeal, Mr. Umans cites the following as errors made by the trial court: (a) failure to make reduction in child support retroactive; (b) failure to reduce child support; (c) awarding of attorney's fees to Ms. Umans; and (d) finding Mr. Umans in criminal contempt.

I. CHILD SUPPORT

The first ground of appeal by Mr. Umans regards the effective date of the child support reduction. The trial court granted the child support modification based on Mr. Umans's reduction in income, as he requested in his January 2004 amended petition. According to Mr. Umans, his amended petition seeking reduction in child support dated January 7, 2004 "relates back" to his original petition dated March 5, 2003.³ Therefore, Mr. Umans argues that the reduction in child support should also relate back and be effective as of March of 2003. Mr. Umans fails to cite authority requiring a trial court to make a reduction in child support retroactive to the date of the petition. In child support modification cases, "the trial court has the discretion to order the modification effective as of the date of the modification petition, the date of the final hearing, or any appropriate date in between." *Huntley v. Huntley*, 61 S.W.3d 329, 339 (Tenn. Ct. App. 2001) (quoting *Bjork v. Bjork*, No. 01A01-9702-CV-00087, 1997 WL 653917 at *8 (Tenn. Ct. App. Oct. 22, 1997)). See also, *Ingle v. Ingle*, No. E200102802-COA-R3-CV, 2002 WL 1798545 (Tenn. Ct. App. Aug. 6, 2002). Because Mr. Umans did not allege the ground of the reduction of his income, which was the basis of the reduction granted by the court, until the day before the hearing, the trial court acted within its discretion in making the reduction effective the date of the hearing.

II. ALIMONY

Mr. Umans also appeals the trial court's failure to decrease his alimony obligation. Trial courts have broad discretion to determine whether spousal support is needed and, if so, its nature, amount and duration. *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004); *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001). Appellate courts are generally disinclined to second-guess a trial court's spousal support decision unless it is not supported by the evidence or is contrary to public policies reflected in applicable statutes. *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). Our role is to determine whether the award reflects a proper application of the relevant legal principles and that it is not clearly unreasonable. *Id.* at 733. When the trial court has set forth its factual findings in the record, we will presume the correctness of those findings so long as the evidence does not preponderate against them. Tenn. R. App. P. 13(d); *Bogan*, 60 S.W.3d at 727; *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn.2000).

Among the factors to be considered by the courts in making spousal support decisions, the two considered to be the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Bratton*, 136 S.W.3d at 604; *Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002); *Bogan*, 60 S.W.3d at 730.

³The original petition filed in March of 2003 requested a reduction in child support based upon Mr. Umans's purported attempts at visitation of his child. The trial court did not reduce child support on that basis.

The trial court's decision in refusing to reduce Mr. Umans's alimony is supported by the evidence and was based on applicable legal principles. There is clear proof in the record of Ms. Umans's continuing needs and her efforts to meet their needs, including two jobs. While Mr. Umans proved that his salary had been reduced, there was no proof that his ability to pay had been reduced. There was also a lack of proof regarding his expenses. Based upon this record and the trial court's findings, we affirm the trial court's denial of alimony modification.

III. ATTORNEY'S FEES

Likewise, we find the amount of attorney's fees awarded Wife to be within the trial court's discretion and decline to adjust the award.

The trial court awarded Wife attorney's fees of One Thousand Four Hundred Dollars (\$1,400). Since attorney's fees are considered spousal support or alimony, an award of fees is subject to the same factors discussed above as in the award of any other type of alimony. *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002). Our Supreme Court had made clear that "[t]he allowance of attorney's fees is largely in the discretion of the trial court and the appellate court will not interfere except upon a clear showing of abuse of that discretion." *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995) (citations omitted). Ms. Umans successfully defended an effort to reduce alimony and obtained a judgment for back alimony. We find the trial court acted within its discretion in the amount of attorney's fees awarded Ms. Umans.

IV. CRIMINAL CONTEMPT

Finally, Mr. Umans appeals the decision of the trial court to find him in criminal contempt. The trial court's rationale for holding him in contempt rests solely on the late payment of child support. It is not based upon the alimony arrearage.

Criminal contempt is a means through which individuals guilty of willfully derogating the authority of the court are punished, whereas civil contempt sanctions protect private rights. *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996). Tennessee holds specific types of conduct to be punishable as contempt of court in Tenn. Code Ann. § 29-9-102, which states, in pertinent part:

The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases: . . .

(3) The willful disobedience or resistance of any officer of such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of said courts.

See also Ahern v. Ahern, 15 S.W.3d 73 (Tenn. 2000). In *Ahern*, our Supreme Court explained the basis for a court's exercise of its contempt powers, distinguished between the two types, and discussed criminal contempt.

An act of contempt is a wilful or intentional act that offends the court and its administration of justice. Tenn. Code Ann. § 29-9-102; *see Graham v. Williamson*, 128 Tenn. 720, 164 S.W. 781, 782 (1914). Traditionally, contempt has been classified as civil or criminal depending upon the action taken by the court to address the contempt.

...

A court can also imprison and/or fine an individual simply as punishment for the contempt. This remedy is commonly referred to as "criminal contempt." Unless otherwise provided, the circuit, chancery, and appellate courts are limited to imposing a fine of \$50.00 and to imprisoning an individual for not more than ten days. Tenn. Code Ann. § 29-9-103. A party who is in criminal contempt cannot be freed by eventual compliance. *See Shiflet*, 217 Tenn. at 693, 400 S.W.2d at 543.

Ahern, 15 S.W.3d at 78-79.

When a party is to be tried for criminal contempt, that person is entitled to all the constitutional protections of any criminal defendant, including the presumption of innocence, the "beyond a reasonable doubt" standard of proof, the protection against self-incrimination, and notice. *Storey v. Storey*, 835 S.W.2d 593, 599 (Tenn. Ct. App. 1992). Among other things, that notice must include "the essential facts constituting the criminal contempt charged." Tenn. R. Crim. P. 42(b); *Storey*, 835 S.W.2d at 600.

The record in the case before us reveals that the request that Mr. Umans be held in contempt stated:

The Mother would show unto the Court that the Father is in criminal contempt of Court for his failure to pay child support, alimony in futuro and payment on the attorney's fee debt according to the Orders of this Court.

The Mother would show unto the Court that the Father failed to make his payments in accordance with the Orders of this Court in September, 2002; October 2002; January 2003; February 2003; March 2003; April 2003; and May 2003.

The evidence at trial was that Mr. Umans was not in arrears on his child support. When asked by the trial court what elements of contempt were present, counsel for Ms. Umans responded that Mr. Umans had failed to pay his alimony obligation.

Mr. Umans testified that his company had changed the way he got paid:

It's changed that since about September of this year [2003] . . . I used to get paid on the 15th of the month. I no longer get paid that way. I get paid five business days after the 15th of the month and five days after the last day of the month.

Mr. Umans attempted to explain that he had started mailing his support checks after his paycheck had been deposited. He also testified that he had talked to his former divorce lawyer about whether it would be okay if he sent the checks for child support and alimony for a certain amount in the beginning of the month and sent the balance later in the month. He explained that, with the new payment schedule from his company, he did not have enough money to pay the full amount of support at the first of the month in view of his other expenses.

However, the court cut this testimony short and asked Mr. Umans, "Do you admit that you didn't pay the child support on the first day of every month, like this order said?" He answered yes. The trial court found that admission sufficient to find him in criminal contempt for "failure to pay child support on time." Although Ms. Umans testified she did not receive her alimony payments on the first of the month, she was not asked about child support.

The only testimony regarding when Mr. Umans was late in paying his child support was that it started in September of 2003. Nothing in the notice of contempt or accompanying filing refers to that date; the latest date alleged for noncompliance with the court order was May 2003, apparently a reference to failure to pay alimony. The sufficiency of the notice is questionable as to the basis on which contempt was found, late payment of child support.

Whether or not the notice was sufficient for the ground found to exist, we cannot conclude that the evidence proved beyond a reasonable doubt that Mr. Umans's failure to pay the full amount of child support on the first of the month was willful. A party can be held in criminal contempt for failure to pay support only if the court first determines that he or she had the ability to pay at the time the support was due and that the failure to pay was willful. *Ahern*, 15 S.W.3d at 79. The trial court herein did not make that finding explicitly. Our examination of the record does not support a finding of willfulness beyond a reasonable doubt.

For the foregoing reasons, we affirm the trial court's findings on child support, alimony, and attorney's fees. We reverse the finding of criminal contempt. Costs of appeal are taxed to the appellant, Frederick Martin Umans.

PATRICIA J. COTTRELL, JUDGE